ENTERED
Office of Proceedings
MAR 01 2012
Part of
Public Record
231927

BEFORE THE
SURFACE TRANSPORTATION BOARD

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION TARIFF PROVISIONS	)	**Docket No. FD 35557**

JOINT APPEAL OF AMEREN ENERGY FUELS & SERVICES COMPANY; ARIZONA ELECTRIC POWER COOPERATIVE, INC.; AUSTIN ENERGY; CLECO CORPORATION; CPS ENERGY; ENTERGY SERVICES, INC.; KANSAS CITY POWER & LIGHT COMPANY; LOWER COLORADO RIVER AUTHORITY; MIDAMERICAN ENERGY COMPANY; MINNESOTA POWER; NEBRASKA PUBLIC POWER DISTRICT; OMAHA PUBLIC POWER DISTRICT; TEXAS MUNICIPAL POWER AGENCY; WESTERN FARMERS ELECTRIC COOPERATIVE; WESTERN FUELS ASSOCIATION, INC.; AND WISCONSIN PUBLIC SERVICE CORPORATION TO FEBRUARY 27, 2012 DECISION BY THE DIRECTOR, OFFICE OF PROCEEDINGS

By: William L. Slover
John H. LeSeur
Andrew B. Kolesar III
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Their Attorneys

Dated: March 1, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION TARIFF PROVISIONS	)	**Docket No. FD 35557**

JOINT APPEAL OF AMEREN ENERGY FUELS & SERVICES COMPANY; ARIZONA ELECTRIC POWER COOPERATIVE, INC.; AUSTIN ENERGY; CLECO CORPORATION; CPS ENERGY; ENTERGY SERVICES, INC.; KANSAS CITY POWER & LIGHT COMPANY; LOWER COLORADO RIVER AUTHORITY; MIDAMERICAN ENERGY COMPANY; MINNESOTA POWER; NEBRASKA PUBLIC POWER DISTRICT; OMAHA PUBLIC POWER DISTRICT; TEXAS MUNICIPAL POWER AGENCY; WESTERN FARMERS ELECTRIC COOPERATIVE; WESTERN FUELS ASSOCIATION, INC.; AND WISCONSIN PUBLIC SERVICE CORPORATION TO FEBRUARY 27, 2012 DECISION BY THE DIRECTOR, OFFICE OF PROCEEDINGS

The above-named organizations (collectively "Member Organizations") of the Western Coal Traffic League ("WCTL") file this appeal of the decision served by the Surface Transportation Board's ("STB" or "Board") Director, Office of Proceedings on February 27, 2012 ("Director's Decision" or "Decision") finding that the Member Organizations "are subject to discovery in this proceeding under the Board's subpoena power." Director's Decision at 1.

The Director's unprecedented Decision – which for the first time orders non-party discovery in a declaratory order proceeding and in one fell swoop calls for the issuance of four times the number of subpoenas issued by the Board in all of its proceedings since 1996 – must be set aside because the Director misapplied the law in a

manner that, if not undone, will have significant chilling effects on the continued public participation by WCTL and other trade associations in proceedings before this agency.

BACKGROUND

BNSF Railway Company ("BNSF") issued its original coal dust tariff ("Dust I Tariff")[1] in the Spring of 2009. The Board proceeded to institute a declaratory order proceeding (STB Docket No. FD 35305) to determine the reasonableness of BNSF's Dust I Tariff. WCTL actively participated in the ensuing Dust I Tariff proceedings and WCTL, along with all other participating shipper parties, urged the Board to find that BNSF's publication of the Dust I Tariff was an unreasonable practice.

In its decision served on March 3, 2011, the Board found that BNSF's publication of the Dust I Tariff was an unreasonable practice.[2] The Board also strongly encouraged the parties to work "collaborat[ively]" to address coal dust mitigation issues. *Id.* at 14. However, BNSF ignored the Board's directive and unilaterally issued a Dust II Tariff[3] in July of 2011.

---

[1] "Dust I Tariff" refers to Item 100, entitled "Coal Dust Mitigation Requirements," initially published on April 30, 2009 in Revision 011 to BNSF's Price List 6041-B and Item 101, entitled "Coal Dust Mitigation Requirements Black Hills Sub-Division," initially published on May 27, 2009 in Revision 012 to BNSF's Price List 6041-B.

[2] *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, STB Docket No. FD 35305 (STB served March 3, 2011).

[3] "Dust II Tariff" refers to Item 100, entitled "Coal Dust Mitigation Requirements," as originally published on July 20, 2011 in Revision 017 to BNSF's Price List 6041-B, and as amended thereafter.

In August of 2011, WCTL and other coal shipper trade associations asked the Board to reopen the *Dust I* case to permit mediation of the legality of the Dust II Tariff.[4] BNSF opposed mediation, leaving the Board with little choice but to deny this request. However, the Board, on its own initiative, instituted a new proceeding – *Dust II* – to address the legality of the Dust II Tariff.

As requested by the Board, WCTL and BNSF agreed upon an "accelerated" procedural schedule, which the Board adopted on December 16, 2012.[5] This procedural schedule permitted interested persons to become parties of record, established a 50-day discovery period, with discovery disputes litigated under the Board's expedited stand-alone cost ("SAC") case rules, and called for three rounds of written submissions.

Several shipper organizations filed notices of intent to participate as parties, including WCTL, American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), National Rural Electric Cooperative Association ("NRECA"), and National Coal Transportation Association ("NCTA"). As is typical in declaratory order proceedings, the parties engaged in discovery, which included discovery requests jointly tendered by WCTL, APPA, EEI, and NRECA to BNSF, and separate discovery requests tendered by BNSF on WCTL, APPA, EEI, NRECA, and NCTA.

However, in an unprecedented action, BNSF also sought to compel discovery against WCTL's non-party Member Organizations. BNSF admitted that it had

---

[4] *See* WCTL's Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation, Docket No. FD 35305 (filed Aug. 11, 2011).

[5] *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557 (STB served Dec. 16, 2011) at 1.

targeted WCTL's Member Organizations for non-party discovery as retaliation for WCTL's active participation in proceedings before this Board.[6] BNSF proceeded to file a motion to compel asking the Board to order WCTL to produce Member Organization documents and information not in WCTL's possession, custody, or control, and separately filed a petition asking the Board to issue 16 subpoenas duces tecum – containing a total of 144 separately numbered document production requests.[7]

WCTL filed a reply in opposition to BNSF's Motion to Compel on February 6, 2012. That reply clearly demonstrated that the Board had no authority to order WCTL to produce information and documents it did not possess or control. WCTL's Member Organizations filed a joint reply to BNSF's subpoena request on February 16, 2012, arguing, *inter alia*, that retaliatory discovery has no place in proceedings before this Board and that BNSF had not proven its entitlement to the issuance of the subpoenas under governing Board precedent.

The Director's Decision asserted that BNSF seeks "legitimate third-party discovery" (*id.* at 3) and found, as a general proposition, that WCTL Member Organizations "are subject to discovery in this proceeding under the Board's subpoena power." *Id.* at 1. The Director further held that the Board will not "address[] the merits of any individual discovery request at this time," but instead asked the 16 WCTL Member Organizations to "negotiate" with BNSF to "more narrowly tailor the bounds" of

---

[6] *See* BNSF Motion to Compel at 8-9.

[7] Copies of these requests are set forth in BNSF's Petition for Subpoenas at Exhibit 1.

BNSF's discovery requests and stated that, if necessary, the Board's staff would hold a "technical conference" to address disputed scope-of- discovery issues after which "the Board will issue appropriate subpoenas." *Id.* at 4. Finally, the Director ordered the procedural schedule to be held in abeyance pending further order of the Board and found that BNSF's Motion to Compel was "moot" in light of its subpoena rulings. *Id.*

ARGUMENT

This case is being litigated as if the Board's SAC discovery procedures apply. *See* STB Decision served December 16, 2012 at 1-2. In a SAC case, under 49 C.F.R. § 1115.9(b), "any interlocutory appeal of a ruling" made by a Board employee must "be filed with the Board within three (3) business days of the ruling" and meet the criteria for interlocutory appeals set forth at 49 C.F.R. § 1115.9(a). These criteria permit, among other things, interlocutory appeals of an employee "ruling [that] grants a request for the inspection of documents not ordinarily available for public inspection" or "may result . . . in substantial detriment to the public interest or undue prejudice to a party." *Id.* at §§ 1115.9(a)(2), (4).

Member Organizations' appeal is timely as it is being filed within the three business days of the issuance of the Director's Decision, and is permissible under § 1115.9(a) because the Director's Decision calls for WCTL Member Organizations to produce "documents not ordinarily available for public inspection," produces a result that is "substantial[ly] detriment[al] to the public interest," and "undu[ly] prejudice[s]" WCTL Member Organizations.

The Board employs a "highly deferential standard of review" when considering appeals under §1115.9, but will not hesitate to overturn an employee decision where the decision misapplies the law or reaches impermissible results. *See, e.g., FMC Wyoming Corp. v. Union Pac. R.R.*, 3 S.T.B. 88, 90 (1998) (overturning ALJ decision that misapplied the law and permitted a rail carrier to "improperly . . . [use] the discovery process"); *Ariz. Pub. Serv. Co. & Pacificorp v. Atchison, Topeka & Santa Fe Ry.*, 2 S.T.B. 367, 371-72 (1997) (overturning ALJ decision as contrary to STB discovery policy).

I.

THE DIRECTOR'S DECISION PRODUCES A MANIFESTLY PREJUDICIAL RESULT THAT IS SUBSTANTIALLY DETRIMENTAL TO THE PUBLIC INTEREST

The Director's Decision does not address the context in which BNSF's Petition was presented to the Board, and, as a result, does not address the very serious adverse public policy results that will follow from the Decision, if the Board does not set it aside on appeal.

Shippers participate in many STB proceedings through their trade associations. They do so because of their costs of participation (*e.g.*, payment of expert witnesses and counsel) are shared, and therefore reduced. Trade associations also provide shipper members some protection from carrier retaliation – whether actual or perceived – for participation in proceedings before the Board.

The Board can rest assured that trade associations will be forever leery of participating in proceedings before this agency – and many will not do so – if they

believe their members will be subject to onerous retaliatory discovery requests issued at the whim of their rail carriers, which is exactly what will happen in this case if the Director's Decision is allowed to stand.

Non-party discovery in STB cases is rare, and unheard of in STB declaratory order proceedings. Nevertheless, BNSF initiated this unprecedented maneuver in this case for one reason and one reason alone: retaliation. BNSF informed the Board in no uncertain terms that it viewed WCTL as a rogue trade association whose Members should be punished for WCTL's assertedly litigious ways[8] by being subject to onerous non-party discovery, whereas other participating trade associations should not:

> WCTL is not a typical trade association. . . . WCTL is little more than a vehicle for WCTL's members to engage in litigation. . . . .
>
> Unlike WCTL, the other industry associations that have indicated that they intend to participate in this proceeding . . . engage in significant non-litigation activities . . . . While BNSF has served discovery requests on those associations, BNSF does not intend to insist on the production of information from members of those associations.[9]

WCTL happens to be BNSF's target today, but tomorrow it could be another shipper trade association, many of whom have hundreds of members.

Moreover, if the Director's Decision stands, any trade association that is brave enough to participate in Board proceedings, and subject its members to non-party

---

[8] In point of fact, in every stage of the *Dust I* and *Dust II* proceedings, *WCTL* has sought to negotiate, or mediate, the issues raised, whereas *BNSF* has refused to negotiate or mediate. *See* Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation (filed Aug. 11, 2011) at 2, 4-5, V.S. Richards at 2-4.

[9] BNSF Motion to Compel at 8-9 (footnote omitted).

discovery, will see its members' litigation costs skyrocket, as each of its targeted members will be forced to pay not only to respond to party discovery directed at the association, but also to pay for non-party discovery directed at individual association members. Responding to non-party discovery is expensive and time consuming for the reasons previously articulated by WCTL Member Organizations:

> BNSF clearly seeks discovery against WCTL's Members because BNSF knows that responding to this discovery will impose significant burdens on each of WCTL's sixteen Members, who each will have to: (i) study BNSF's requests; (ii) consult with in-house and outside counsel concerning the preparation of their responses; (iii) review their files (hard copy and electronic); (iv) copy responsive documents (if any); (v) address and resolve privilege and related issues; (vi) address and resolve confidentiality matters involving other non-parties (*e.g.*, where RFPs seek confidential contracts and related matters); (vii) classify documents as privileged, highly confidential, confidential or public; (viii) collate and bates stamp production; and (ix) address the myriad of other issues that arise with document production including disputes with BNSF. Undertaking these actions will be very time-consuming and expensive for each WCTL Member, and will add to the already significant financial outlays WCTL's Members are incurring to fund WCTL's participation in this case.[10]

Historically, two principal complaints about Board proceedings have been that they cost too much, and that shippers are fearful of participating in proceedings because they believe that their rail carriers will retaliate against them.[11] The Board has

---

[10] Member Organizations' Reply to BNSF Petition for Subpoenas (filed Feb. 16, 2012) at 15-16.

[11] *See* U.S. Gov't Accounting Office, GAO/RCED-99-46, *Current Issues Associated with the Rate Relief Process* 47-50 (1999) (high costs and fear of reprisal from

taken several positive actions to address these concerns;[12] unfortunately, the Director's Decision is a major step backward.

The Director's Decision clearly sanctions one form of carrier retaliation – retaliatory discovery – which is likely to have a chilling effect on continued participation by trade associations in STB proceedings where their members may be subject to discovery. The Board, and the public, lose here because as a practical matter in many instances only shipper trade associations have the financial resources to participate in proceedings before the Board and to respond meaningfully to extensive presentations made by railroads in these proceedings.

Moreover, even if an association is willing to subject its members to discovery, its members' costs will necessarily rise exponentially if each of its member companies is subject to time consuming and costly third-party discovery. Trade associations, and their members, have finite resources, and they already shoulder substantial costs in participating in major proceedings before the Board, particularly in cases where railroad parties are spending millions on experts, counsel, etc. Forcing trade

---

railroads are principle reasons why many shippers do not participate in proceedings before the Board).

[12] *See, e.g., Regulations Governing Fees for Services*, STB Docket No. EP 542 (Sub-No. 18) (STB served July 7, 2011) at 2 (STB reduces and caps complaint filing fees to "minimize any chilling effect of high fees, and encourage outside parties to bring allegations of regulatory violations before the Board for adjudication"); *Market Dominance Determinations – Product & Geographic Competition*, 3 S.T.B. 937, 938 (1998) (STB modifies its market dominance rules to "negat[e] [the] chilling effect" of its prior rules and "further level the playing field between railroads and shippers").

associations to bear costs of non-party discovery where such discovery is not uniquely necessary, is contrary to the public interest.

II.

THE LAW DOES NOT COMPEL THE RESULT REACHED BY THE DIRECTOR

The Director's Decision is predicated upon several legal conclusions that WCTL Member Organizations submit are either incorrect, or misapplied, given the public interests at stake.

A. BNSF Has Not Demonstrated Its Entitlement to the Extraordinary Relief It Seeks Under Governing Non-Party Discovery Standards

The STB has the statutory authority to issue subpoenas duces tecum ordering non-party discovery. *See* 49 U.S.C. §§ 721(c). However, non-party discovery is in an extraordinary remedy and one that is seldom sought or granted in STB proceedings. Under the STB's Rules of Practice, the Board can only issue such a subpoena if the moving party first seeks and obtains an order from the Board authorizing the issuance of the subpoena.

A long line of governing case law holds that non-party discovery will be ordered only if the moving party presents a "very strong foundation" in support of its request. *See Asphalt Supply & Serv., Inc. v Union Pac. R.R.*, ICC Docket No. 40121, 1987 WL 98155 at *1 (ICC decided Mar. 27, 1987) ("from very early in its existence the Commission has required the laying of a very strong foundation before it will use its

subpoena power to compel from a stranger to the litigation . . . actions which may be expensive, oppressive or burdensome").

The Director's Decision asserts that in this case BNSF does not have to demonstrate a "very strong foundation" before the Board will issue a subpoena because this rule applies only where a subpoena is directed at "a stranger to the litigation" and the "Member Organizations clearly are not strangers to the instant litigation" because "they have clear interest in the proceeding and will obviously be affected by its outcome." *Id.* at 2. With all due respect, the Director has misconstrued the meaning of "a stranger to the litigation," as it is just a short-hand phrase for any non-party.[13]

For example, in *Asphalt Supply*, the complainant shipper sought the issuance of a subpoena of shipment records from a company that was "a party to the transportation here involved . . . [but] not a party to the proceeding." *Id.*, 1987 WL 98155 at *1. The ICC referred to the non-party as "a stranger to the litigation," because it was a non-party, not because it was not intimately involved in underlying transportation, or had no interest in the outcome of the case. The ICC denied the requested subpoena because no "very strong foundation" had been laid for it. *Id.*

Similarly, the ICC predicated its "very strong foundation" standard on an earlier seminal decision establishing the standards used by the agency in deciding whether to issue subpoenas against non-parties: *Rice v. Cincinnati, Washington & Baltimore R.R.*, 3 I.C.C. 186 (1889). In *Rice*, the ICC ruled that the "extraordinary"

---

[13] *See, e.g., Black's Law Dictionary* 1421 (6th ed. 1990) ("**Strangers.** By this term is intended third persons generally.").

remedy of the issuance of a subpoena duces tecum "against those that are not parties to the proceeding" required a "very clear and full" foundation, and one which was more "stringent" than the standard that applied to discovery between parties to the litigation. *Id.* at 211-12, 214.

In addition, in *Rice*, while the involved non-parties were also described as "strangers to the proceeding," these non-parties, including the famous Standard Oil Trust and its affiliates, were intimately involved and extremely interested in the outcome of the proceeding since the case involved whether the non-parties were receiving preferential rates that permitted them to profit at the expense of the complainant. *Id.* at 203, 211.

BNSF has not established any credible foundation, much less "a very strong foundation" for the discovery it seeks. Instead, BNSF admits that it has targeted WCTL Member Organizations for retaliatory discovery – discovery that BNSF does not need to present its case to the Board. BNSF's actions here also stand in stark contrast to the Board's rulings in the four cases where the Board has issued subpoenas duces tecum. In each of these cases, the party seeking the issuance of a subpoena did present a very strong foundation for production of the documents it sought, and the documents were vital for purposes of meeting the moving party's burden of proof. [14]

---

[14] *See Wisconsin Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42051, 2000 WL 799085 at *2 (STB served June 21, 2000) (directing production by a consultant employed by the complainant shipper to produce specified coal demand and traffic forecasts); *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42057, 2002 WL 127071 at *2 (STB served Feb. 1, 2002) (directing a contractor of the defendant railroad to produce locomotive fuel gauge data); *Arizona Pub. Serv. Co. v. Burlington N. & Santa Fe Ry.*, STB Docket No. 41185, 2003 WL 23009129 at *1 (STB served Dec. 23, 2003) (directing non-party utility whose traffic was included

B. BNSF Also Did Not Establish Its Right to the Extraordinary Relief It Seeks Under the Board's Party-Based Discovery Standards

The Director's Decision found that BNSF was entitled to obtain non-party discovery by applying the Board's standards governing party-based discovery set forth at 49 C.F.R. § 1114.21. According to the Director, BNSF was entitled to obtain discovery against Member Organizations under these standards because BNSF was seeking the discovery of "legitimate" and "relevant" information from them, and any concerns about burden could be addressed by the Board in separate order, if necessary. *Id.* at 3-4.

It is unclear why the Director found that the Board's party-based discovery standards apply to the issuance of a subpoena against non-parties, other than the Director's statements that WCTL Member Organizations "have a clear interest in the proceeding." *Id.* at 2. However, for discovery purposes under both the Board's Rules of Practice, and the Federal Rules of Civil Procedure, trade associations are "jural entities," separate and distinct from their members, and members of trade associations are not subject to party-based discovery simply because they "have a clear interest in the proceeding."[15]

---

in the complainant shipper's traffic group to produce traffic projections); *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, STB Docket No. 42125 (STB served Dec. 9, 2011) at 1-2 (directing corporate affiliate of the complainant shipper to produce information concerning the affiliate's private truck fleet operations).

[15] *See Sperry Prods. Inc. v. Ass'n of Am. R.R.s*, 132 F.2d 408, 411 (2d Cir. 1942); *Univ. of Tex. v. Vratil*, 96 F.3d 1337, 1339-40 (10th Cir. 1996); *Farmland Indus., Inc. v. Gulf Cent. Pipeline Co.*, ICC Docket No. 40411, 1992 WL 67306 at *5 (ICC decided Apr. 2, 1992).

Moreover, even assuming *arguendo* that more lenient party-based discovery standards apply to non-party discovery, BNSF failed to meet its burden of proof. BNSF's retaliatory discovery is hardly "legitimate" and another long line of STB discovery cases hold that the Board "requires more than a minimal showing of potential relevancy" before it will order party-based discovery.[16] Instead, a party "must demonstrate a real, practical need for the information." *Id.* BNSF has not made any such demonstration, nor did the Director require that BNSF do so.

Also, the Board will not order party-based discovery if "it would be unduly burdensome in relation to the likely value of the information sought."[17] The Director evidently concluded that BNSF's discovery requests as drafted were unduly burdensome. Rather than denying BNSF's Petition on this ground, however, the Director ordered that each of WCTL's 16 Member Organizations begin negotiations with BNSF to limit the scope of the requests, subject to further proceedings before the Board.

Any shipper that has attempted to negotiate discovery limitations with a rail carrier knows that such negotiations are usually very complicated and expensive when only one shipper is involved, much less when 16 different shippers attempting to address a total of 144 separate and outrageously overbroad discovery requests.[18] Rather than

---

[16] *See Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No 42121 (STB served Nov. 24, 2010) at 2 (internal quotations and citations omitted).

[17] *Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook R.R.*, STB Docket No. AB-124 (Sub-No. 2) (STB served Nov. 14, 2003) at 2.

[18] *See* Member Organizations' Reply to BNSF Petition for Subpoenas (filed Feb. 16, 2012) at 13-15 (demonstrating that BNSF's subpoena requests are grossly overbroad). This process would be further complicated in the instant case because the Director has

forcing WCTL Member Organizations to help BNSF cooper-up its extraordinarily overbroad and burdensome requests after the fact – requests that are not legitimate to start with – the Board should overturn the Director's Decision and end BNSF's discovery side-show now.

This result also will serve as a sound precedent in future proceedings involving non-party subpoenas because parties seeking such subpoenas will be incented to draw narrow requests, knowing that their failure to do so will result in such requests being denied. Conversely, the Director's approach encourages parties to draw overly broad requests, since there is no penalty for doing so

C. Non-Party Discovery Is Not Permissible Under the Agreed Upon Procedural Schedule

The Board has denied requested discovery in cases where granting the request is inconsistent with the governing "expedited" case procedures. *See Canexus Chems. Canada L.P. v. BNSF Ry.*, STB Docket No. 42132 (STB served Feb. 2, 2012) at 4-5. Obviously, pursuit of third-party discovery is inconsistent with the governing "accelerated" procedural schedule in this case, as the Director's Decision has placed the schedule in abeyance pending completion of the ordered non-party discovery process.

The Director claims that the Board's rulings in *Canexus* are distinguishable because there is no "prescribed deadline for decision" in this proceeding. Director's Decision at 3. The fact that there is no "prescribed deadline for decision" supports

---

ruled that WCTL Member Organization's are subject to non-party discovery but "has not address[ed] the merits of any individual discovery request at this time."

keeping this case moving. In any proceeding, the longer it takes, the more it costs. That is why WCTL agreed with BNSF to an "accelerated" schedule, which the Board granted.

Moreover, the Board has repeatedly urged parties in cases before it to reach agreement on procedural issues, and to take actions to keep cases moving in a timely manner. Clearly, in this case, the accelerated procedural schedule that WCTL and BNSF agreed to did not contemplate any time consuming third-party discovery procedures. The Board should enforce, not undercut, party agreements to keep cases moving – a result that also furthers the Congressional directives that the agency consider and resolve cases in a timely manner.[19]

CONCLUSION

For the reasons set forth above, WCTL respectfully requests that the Board hear its appeal and vacate the Director's Decision in its entirety.

Respectfully submitted,

By: 

William L. Slover
John H. LeSeur
Andrew B. Kolesar III
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

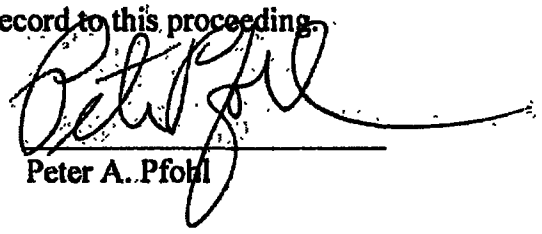
Dated: March 1, 2012

Attorneys for Member Organizations

[19] *See* 49 U.S.C. § 10101(15) (establishing as national rail transportation policy "the expeditious handling and resolution of all proceedings" brought before the Board).

CERTIFICATE OF SERVICE

I hereby certify that this 1st day of March, 2012, I have caused copies of the forgoing Joint Appeal to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding.



Peter A. Pfohl